82-1828

No.

Supt. U.S.
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STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether it was "appropriate," within the meaning of Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), to award attorneys' fees to a party who failed to prevail on any aspect of its challenge to the issuance of a permit by the Administrator of the Environmental Protection Agency.

II

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption of this case, Montana Power Company, Washington Water Power Company, Puget Sound Power and Light Company, Portland General Electric Company and Pacific Power and Light Company were intervenor-respondents below. The interests of these parties are not implicated by the question presented in this petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States Environmental Protection Agency, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-4a) holding the Environmental Protection Agency liable for attorneys' fees is reported at 670 F.2d 847. The order of the court of appeals (App. B, *infra*, 5a) fixing the amount of those fees is unreported.

JURISDICTION

The judgment order of the court of appeals (App. B, *infra*, 5a) was entered on March 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), provides in pertinent part as follows:

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

STATEMENT

Following a wholly unsuccessful challenge to the issuance of a permit by the Environmental Protection Agency ("EPA") to a consortium of utilities headed by Montana Power Company allowing construction of two coal-fired steam electric generating units in Colstrip, Montana, respondent Northern Plains Resource Council ("NPRC") sought an award of attorneys' fees against the government under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). Although it had rejected every aspect of respondent's challenge to the permit, the court of appeals determined that NPRC was entitled to attorneys' fees. Before discussing the court's ruling on attorneys' fees, we briefly describe the underlying merits litigation. As the court of appeals noted, respondent raised "[t]wo rather technical issues" in that proceeding. *Northern Plains Resource Council* v. *United States Environmental Protection Agency*, 645 F.2d 1349, 1350 (9th Cir. 1981).

1.a. Part C, subpart I of the Clean Air Act, 42 U.S.C. (Supp. IV) 7470-7479, is designed to *p*revent *s*ignificant *d*eterioration ("PSD") of air quality in areas designated as having air quality better than that required by existing ambient air quality standards. Areas subject to PSD regulation are divided into three classes, and maximum allowable increases ("increments") in emissions for particulate matter and sulfur dioxide are established for each class.[1] Major

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[1]The areas are classified as Class I, Class II and Class III (42 U.S.C. (Supp. IV) 7472, 7474). The smallest allowable increases in pollution apply to Class I areas and the greatest apply to Class III areas (42 U.S.C. (Supp. IV) 7473(b)).

emitting facilities must secure a PSD permit prior to commencement of construction of a new plant or modification of an existing plant (42 U.S.C. (Supp. IV) 7475). Among other things, a permit applicant must show that emissions from operation of the new or modified plant will not cause or contribute to a violation of the applicable maximum allowable increase or "increment" (42 U.S.C. (Supp. IV) 7475(a)(3)). Furthermore, the facility must utilize the "best available control technology" to limit emissions (42 U.S.C. (Supp. IV) 7475(a)(4)). Although best available control technology determinations must take into account energy, economic and other factors, emissions may not exceed the emissions limitations incorporated in any new source performance standard ("NSPS") promulgated by EPA that is applicable to the industrial category to which the source belongs (42 U.S.C. (Supp. IV) 7475(a)(3)).[2]

Whether any given major emitting facility is subject to the PSD provisions of the Act turns on whether it "commenced construction," as defined in Section 169(2)(A) of the Act, 42 U.S.C. (Supp. IV) 7479(2)(A), prior to the effective date of those provisions. PSD review is required unless the owner or operator of the facility is able to demonstrate that (1) all permits under federal, state and local air pollution laws have been received and a continuous program of physical on-site construction has begun or (2) the owner or operator has entered into binding agreements or contractual obligations that cannot be cancelled or modified without substantial loss (42 U.S.C. (Supp. IV) 7479(2)(A)). In contrast to the definition of "commenced construction" for purposes of new source performance standards, discussed below, the statutory definition of that term for PSD purposes applies to the entire plant rather than to particular pieces of equipment within a plant.

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[2]The provisions of the Act pertinent to new source performance standards are explained at pages 4-5, *infra*.

b. Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411, requires EPA to set performance standards limiting emissions from new or modified air pollution sources that reasonably may be anticipated to endanger the public health or welfare. Section 111(a)(2), 42 U.S.C. (Supp. IV) 7411(a)(2), defines a "new source" as any stationary source the construction or modification of which commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance that is applicable to such source. Unlike the PSD provisions, however, the new source provisions of the Act contain no statutory definition for the term "commenced construction." Accordingly, EPA promulgated regulations providing that construction will be deemed to have commenced if the owner or operator of the source has entered into a "contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction * * *" (40 C.F.R. 60.2).

In 1971, EPA promulgated new source performance standards for fossil-fuel fired steam electric generators. EPA published proposed revisions to those standards on September 19, 1978, and adopted final revised standards on June 11, 1979. The final standards imposed more stringent emission limitations than those contained in the 1971 standards.[3]

New source performance standards apply to specific elements of process equipment, defined as "affected facilities," 40 C.F.R. 60.40(a), 60.41, and, in the case of fossil-fuel steam electric generating units, the "affected facility" is the boiler. Thus, for NSPS purposes, boilers on which construction commenced, in accordance with the regulatory

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[3]The 1979 regulations were upheld in *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981).

definition of that term, 40 C.F.R. 60.2, before September 19, 1978 (the date of publication of the proposed NSPS revisions), are subject to the 1971 NSPS.

2. In July 1976, a consortium of electric utilities headed by Montana Power Company applied to EPA for a permit to construct Units 3 and 4 of a four-unit steam electric generating complex in Colstrip, Montana.[4] On September 11, 1979, EPA granted a permit for Units 3 and 4.[5] Shortly thereafter, respondent filed a petition for review in the Ninth Circuit, and the utility consortium intervened on EPA's side to defend the permit.[6]

Respondent challenged EPA's issuance of a PSD permit to the consortium on two grounds. First, it claimed that the units would not utilize the "best available control technology" as required by the PSD provisions. Respondent argued that because actual on-site construction for Units 3 and 4 had not "commenced" before September 18, 1978, the units were required to comply with emission standards established by the 1978 proposed NSPS regulations instead of the 1971 regulations. Therefore, according to respondent, EPA's decision to allow the units to emit pollutants in excess of the 1978 proposed standards was unlawful. Respondent also claimed that EPA's decision to accept the

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[4]Colstrip Units 1 and 2 were completed in 1976. See *NPRC* v. *EPA*, *supra*, 645 F.2d at 1351.

[5]As described by the court of appeals, the permit proceedings, in which respondent participated, were protracted, in part because of intervening changes in the law. See *NPRC* v. *EPA*, *supra*, 645 F.2d at 1351-1352.

[6]Jurisdiction in the court of appeals was properly predicated on Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(b)(1), which provides that judicial review of "final action of the Administrator * * * which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit."

control system proposed by the company to limit particulate emissions was without a rational basis because other available control technologies could achieve greater emission reductions.

The second aspect of respondent's challenge related to EPA's failure to "validate" the air quality dispersion model, used to predict the impacts of emissions from Units 3 and 4, with certain monitoring data proferred by respondent. Respondent argued that consideration of its data would have shown that emissions from the units would violate the applicable Class I PSD increment for sulfur dioxide at the nearby Northern Cheyenne Reservation.

The court of appeals rejected respondent's arguments and upheld EPA's decision in its entirety. *NPRC* v. *EPA, supra.* First, as to respondent's technological arguments, the court ruled that the applicable new source performance standard for Units 3 and 4 was that published in 1971. This conclusion was based on a finding that, with respect to Units 3 and 4, construction of the boilers had "commenced" in 1974, well before proposed revisions to the new source performance standards were published in 1978. See 40 C.F.R. 60.2, 60.40(a). Relying on the structure of the Clean Air Act and its legislative history, the court agreed with EPA that the applicable definition of "commenced construction" was the new source definition, which applies to "affected facilities," *i.e.*, the boilers, and rejected respondent's argument that the broader PSD definition of that term controlled (645 F.2d at 1355-1357).

As for EPA's approval of the emissions control technology for the units, the court agreed with EPA's position that the Act requires such determinations to be made on case-by-case basis. *NPRC* v. *EPA, supra*, 645 F.2d at 1359. Accordingly, the court held that even though another control technology might provide greater emissions reductions,

EPA's approval of the proposed system was not irrational in view of all the factors the agency is required to consider when making a technological judgment of that sort (645 F.2d at 1361-1362).

Finally, the court rejected respondent's challenge to the model utilized by EPA to predict emissions from the proposed units, holding that EPA's rejection of the monitoring data proferred by respondent was not irrational (*NPRC* v. *EPA, supra,* 645 F.2d at 1362-1363); indeed, the court noted that respondent's data was "completely irrelevant" (*id.* at 1363) to EPA's model.

3. After losing on every aspect of its challenge to the PSD permit, respondent moved for an award of fees[7] under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). In support of its motion, respondent argued that it was entitled to fees because, although it had not prevailed on any issues, the suit was of the type Congress sought to encourage, *i.e.*, it had been brought with the objective of protecting air quality and it had aided in the construction and implementation of the Act.

The court of appeals agreed with respondent's position (App. A, *infra*, 1a-4a). The court found that Congress "sought to facilitate challenges of EPA decisions in order to insure that EPA fulfilled its designated function of preserving air quality" (*id.* at 2a). Relying on *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981), the court stated "that in determining whether a party—prevailing or non-prevailing—can recover attorneys' fees under § 307(f) from the Government, the test is whether in light of what was known * * * when the action was instituted, the action was

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[7]Respondent did not indicate the amount of fees it sought.

of the type Congress sought to encourage when it authorized awards of attorneys' fees" (App. A, *infra*, 2a). The court concluded that respondent's action presented issues important to the construction of the Act and was, therefore, precisely the type of suit Congress wished to encourage in enacting Section 307(f) (App. A, *infra*, 3a).

The court allowed respondent 14 days in which to specify the size of its requested fee award and allowed EPA a like period of time in which to file an opposition. In April 1982, EPA and respondent ultimately agreed that $15,000 was a reasonable fee for respondent's unsuccessful litigation efforts. The parties stipulated, however, that EPA reserved its right to seek further review on the underlying question of entitlement to fees and moved the court to enter a final order to that effect.

The court took no immediate action on the parties' stipulation and motion.[8] By letter dated July 12, 1982, counsel for respondent inquired about the status of the matter (App. C, *infra*, 6a-7a), but the court did not respond. By October 18, 1982, the date on which this Court granted the government's petition for a writ of certiorari in *Administrator, Environmental Protection Agency* v. *Sierra Club*, No. 82-242 (argued Apr. 25, 1983), the court of appeals still had not entered any order in response to the parties' stipulation and motion. Accordingly, by motion dated October 25, 1982, the government asked the court of appeals to stay the entry of final judgment pending this Court's decision in *Sierra Club*. On March 3, 1983, the court denied the motion and ordered EPA to pay $15,000 in attorneys' fees to respondent (App. B, *infra*, 5a).

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[8]Even if the government had decided against seeking review in this Court, a final judgment from the court of appeals would have been required before the General Accounting Office would pay respondent's fee award. See 28 U.S.C. 2414. Thus, the case remained in limbo while the parties awaited the entry of final judgment by the court of appeals.

REASONS FOR GRANTING THE PETITION

This case raises precisely the same issue that is now pending before the Court in *Administrator* v. *Sierra Club, supra,* No. 82-242.[9] We have set forth our arguments against the construction of Section 307(f) adopted by the United States Court of Appeals for the District of Columbia Circuit in our briefs in *Sierra Club*, and the same arguments are fully applicable here.[10] Accordingly, this case will be controlled by the Court's decision in *Sierra Club.*

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's decision in *Administrator* v. *Sierra Club*, No. 82-242.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1983

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[9]In the court below, the government also argued that, in the event any fee award was made, the intervenor-respondents should be required to share the costs of that award with EPA. The court of appeals rejected this argument (App. A, *infra*, 3a n.4). We doubt the correctness of the court's ruling, but we do not now seek this Court's review of that subsidiary issue.

[10]We are furnishing respondent's counsel with copies of our opening and reply briefs in *Sierra Club*, in which those arguments are set forth.

DOJ-1983-05

APPENDIX A

NORTHERN PLAINS RESOURCE COUNCIL, Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent,

The Montana Power Company, the Washington Water Power Company, Puget Sound Power and Light Company, Portland General Electric Company, and Pacific Power and Light Company, Intervenors.

No. 79-7618

United States Court of Appeals, Ninth Circuit.

March 1, 1982.

Before TANG, SCHROEDER and NELSON, Circuit Judges.

ORDER

In *Northern Plains Resource Council* v. *EPA*, 645 F.2d 1349 (9th Cir. 1981), we affirmed the decision of the EPA. Subsequent to our decision, Northern Plains Resource Council (NPRC) filed for an award of attorney's fees pursuant to the Clean Air Act, § 307(f), 42 U.S.C. § 7607(f) (§ 307(f)). EPA opposes this request, primarily arguing that under the circumstances of this case an award of attorney's fees would be inappropriate.[1]

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[1]EPA also argues that NPRC's motion is defective because it was filed 55 days after judgment and because it does not specify the amount of fees sought. The costs of litigation covered by § 307(f) are not the same costs this court is authorized to award under Fed. R. App. Pro. 39. Therefore, Rule 39's 14-day time limit for filing costs bills does not

DISCUSSION

Section 307(f) provides that "in any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney's and expert witness's fees) whenever it determines that such an award is appropriate." As EPA recognizes, Congress, by adopting this section of the Clean Air Act, did not intend to limit the award of attorney's fees to the "prevailing party."[2] Instead, Congress sought to facilitate challenges of EPA decisions in order to insure that EPA fulfilled its designated function of preserving air quality. See *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802, 804 (D.C. Cir. 1981). We agree with the D.C. Circuit that in determining whether a party—prevailing or nonprevailing—can recover attorney's fees under § 307(f) from the Government, the test is "whether in light of what was known . . . when the action was instituted, the action was of the type Congress sought to encourage when it authorized awards of attorneys' fees." *Id.*

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apply to motions for attorney's fees filed pursuant to § 307(f). Because prior to October 1, 1981, there was no prescribed time limit for filing a motion for attorney's fees, NPRC's motion was not untimely. *Cf.* Local Rule 14(g) (effective October 1, 1981, requests for attorney's fees must be filed within 30 days of entry of judgment); *cf. also* Local Rule 13(b)(1)(E) (effective October 1, 1981, party must indicate in brief if attorney's fees will be sought).

We also refuse to reject NPRC's motion on the ground that it does not specify the amount of attorney's fees requested. Although the amount of attorney's fees requested should generally be included in a motion for attorney's fees, failure to specify the amount requested does not require denial of the motion.

[2]See H.R. Rep. No. 294, 95th Cong., 1st Sess. 337 *reprinted in* [1977] U.S. Code Cong. & Adm. News 1077, at 1416 ("The committee did not intend that the court's discretion to award fees under [§ 307(f)] should be restricted to cases in which the party seeking fees was the 'prevailing party' ").

Applying this test in the instant case, we believe NPRC is entitled to an award of attorney's fees. Contrary to EPA's argument, at least two of the issues presented in this case had not been decided by this court prior to the institution of this suit.[3] Moreover, the interest of certain NPRC members in preserving the value of their property which might have been decreased if the power plants were built would not have been sufficient incentive to encourage the expenditures required by a suit of this type.

Because NPRC brought this suit to promote the quality of air resources, and because the suit presented issues important to the construction of the Clean Act Act, this is precisely the type of suit Congress sought to encourage by enacting § 307(f). An award of attorney's fees to NPRC is therefore appropriate under that section.[4]

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[3]As we indicated in our opinion, the precise issue presented in this case relating to "commenced construction" had not been considered by this court in *Montana Power Co.* v. *EPA*, 608 F.2d 334 (9th Cir. 1979). *Northern Plains*, 645 F.2d at 1357 n.24. Nor had this court decided the issue of the applicability of new source performance standards prior to institution of this suit. The fact that other courts considered this issue prior to the release of our decision in no way affects NPRC's entitlement to attorney's fees. See *Metropolitan Washingtion*, 639 F.2d at 804.

[4]EPA argues that if NPRC is awarded attorney's fees, it is entitled to contribution from intervenor Montana Power Company. However, there is no indication that Congress sought to require a prevailing intervening party to indemnify the party challenging an EPA decision. Instead, § 307(f) simply evinces a willingness on the part of Congress to have the Government bear the cost of litigation brought to promote air quality.

CONCLUSION

NPRC is entitled to attorney's fees under § 307(f). It will have 14 days from the entry of this order to file a motion specifying the amount of fees sought with supporting documents justifying the request. EPA will have 14 days from the date NPRC files its motion to file an opposition to NPRC's motion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL,	)	
Petitioner,	)	No. 79-7618
vs.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	*ORDER*
Respondent, and	)	
THE MONTANA POWER COMPANY, THE WASHINGTON WATER POWER COMPANY, PUGET SOUND POWER AND LIGHT COMPANY, PORTLAND GENERAL ELECTRIC COMPANY, and PACIFIC POWER & LIGHT COMPANY,	)	
Intervenors.	)	

[Filed: Mar. 3, 1983]

Before: TANG, SCHROEDER and NELSON, Circuit Judges

Respondent's motion to stay the award of attorney fees in this case is denied.

Petitioner is awarded the sum of $15,000 in attorney fees pursuant to the agreement of the parties.

APPENDIX C

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July 12, 1982

Mr. Richard Deane
Clerk of the Court
Ninth Circuit Court of Appeals
P. O. Box 547
San Francisco, California 94101

Re: *Northern Plains Resource Council v. EPA*, No. 79-7618

Dear Mr. Deane:

On March 1, 1982 the court in the above referenced action determined that the appellant, Northern Plains Resource Council, was entitled to its attorney's fees incurred in this appeal. Subsequently a specification of attorney's fees was provided to the court and the Environmental Protection Agency submitted a memorandum in opposition to that specification. Subsequent to that, the Northern Plains Resource Council and EPA reached an agreement with respect to fees and the Northern Plains Resource Council submitted an amended specification of attorney's fees. The amended specification was filed in mid-April 1982. Since that date, the undersigned has not received any orders or other approval of the fees agreed to by the parties.

Would you please advise me the present status of the request for attorney's fees.

Sincerely yours,

James A. Patten

JAP/jrg

cc: Counsel of Record

No. 82-1828

In The
Supreme Court of the United States
October Term, 1982

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petitioner,

vs.

NORTHERN PLAINS RESOURCE COUNCIL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals properly construed Clean Air Act Section 307(f), 42 U. S. C. Section 7607(f), by awarding attorneys fees to respondent even though they did not prevail on the merits.

II. Whether the petition for a writ of certiorari was filed within the time provided by law.

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No. 82-1828

In The
Supreme Court of the United States
October Term, 1982

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petitioner,

vs.

NORTHERN PLAINS RESOURCE COUNCIL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT

The United States Environmental Protection Agency ("EPA") has petitioned this Court for a Writ of Certiorari seeking review of an order entered by the Court of Appeals for the Ninth Circuit awarding attorneys fees to the Northern Plains Resource Council ("NPRC"). *Northern Plains Resource Council v. United States Environmental Protection Agency,* 670 F.2d 847 (9th Cir. 1982) (Pet. App. A). In that case NPRC had unsuccessfully challenged a permit issued under Part C, subpart I of the Clean Air Act, 42 U.S.C. (Supp. IV) 7470-7479, to a consortium of

electric power utilities to construct what are known as "Colstrip Units 3 and 4." *Northern Plains Resource Council v. United States Environmental Protection Agency*, 645 F. 2d 1349 (9th Cir. 1981). Thereafter, NPRC sought attorneys fees pursuant to § 307(f) of the Clean Air Act, 42 U. S. C. (Supp. IV) 7607(f). On March 1, 1982 the court of appeals ordered EPA to pay NPRC its attorneys fees stating that "this is precisely the type of suit Congress sought to encourage by enacting § 307(f)." (Pet. App. A at 3a).

In its March 1, 1982 order, the court of appeals directed NPRC to file a motion specifying the amount of fees sought (Pet. App. A at 3a). Subsequently NPRC and EPA stipulated and agreed that $15,000 was a reasonable amount for the fees. The court of appeals was advised of this agreement on March 27, 1982 by EPA and again on March 31, 1982 by NPRC (Apps. A and B). That agreement, however, did not preclude EPA from seeking further review of the March 1, 1982 order. EPA advised the court that "the government does not agree that an assessment of fees against the government in these circumstances is appropriate and payment to NPRC is without prejudice to the government's right to seek further review." (App. A at App. 2). NPRC confirmed this understanding by stating to the court of appeals that EPA reserved its right to seek review *only* of the March 1, 1982 order (App. B at App. 4). Even though a settlement had been achieved, the court of appeals did not order the payment of those fees until March 3, 1983 (Pet. App. B).

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REASON FOR DENYING THE PETITION

EPA has failed to file its petition for a writ of certiorari in a timely fashion and it must therefore be denied.

A petition for a writ of certiorari in civil cases in the courts of appeals must be filed within ninety days after the entry of the decree sought to be reviewed. 28 U. S. C. § 2101(c). This Court lacks jurisdiction over any petition filed beyond the ninety day period, unless an extension is sought and granted.[1] *Department of Banking v. Pink*, 317 U. S. 264 (1942); *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399, 418 (1923); *Matton Steamboat Co. v. Murphy*, 319 U. S. 412, 415 (1943).

Rule 20.4, Sup. Ct. R. (1983), provides that:

> "The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. . . ."

EPA is seeking review of the court of appeals order of March 1, 1982, awarding attorneys fees to NPRC. EPA does not dispute or question the specific amount of those fees. (See Pet. at (I)). Indeed, EPA has taken the position before the court of appeals that it would seek review only of the March, 1982 order. According to Rule 20.4, Sup. Ct. R. (1983), EPA's application for a writ of certiorari should have been filed within ninety days of March 1, 1982.

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1 Section 2101 (c) of Title 28 permits an extension of time to apply for a writ of certiorari of up to sixty days. No extension has been sought in this case.

Decisions of this Court demonstrate that EPA has filed an untimely petition for a writ of certiorari. In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company,* 344 U. S. 206 (1952), this Court rejected the proposition that subsequent proceedings before the court of appeals, which did not affect any rights already adjudicated, would extend the time period in which to apply for certiorari. That case grew out of a proceeding before the Federal Trade Commission wherein a three count complaint was issued against Minneapolis-Honeywell Regulator Co.[2] The Commission, after hearing, ruled against Minneapolis-Honeywell on all three counts and entered a cease and desist order. Minneapolis-Honeywell sought review in the Court of Appeals for the Seventh Circuit. Before that court, Minneapolis-Honeywell abandoned its challenge to counts I and II; the court of appeals reversed the Commission on count III. The Commission thereafter requested the court of appeals to affirm the first two counts which the court did. In so affirming, the court of appeals again stated that count III was reversed and dismissed. The Commission then sought certiorari. Significantly the Commission's petition was filed within ninety days of the order affirming counts I and II, but well beyond ninety days of the entry of the first order dismissing count III. Minneapolis-Honeywell raised the issue of the timeliness of the Commission's petition for a writ of certiorari. The Commission argued to this Court that its request to the court of appeals to

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2 Count I charged violations of the Federal Trade Commission Act, Count II, the Clayton Act, and Count III, the Robinson-Patman Act. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company,* 344 U. S. at 207.

affirm counts I and II extended the time period to seek certiorari. This Court rejected that argument:

> "... we cannot hold that the time for filing a petition for certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had no effect on the merits of the decision that we are now asked to review in the petition for certiorari."

344 U. S. at 211.

Department of Banking v. Pink, 317 U. S. 264 (1942), was a review of a New York case. The New York Court of Appeals remitted the case to the New York Supreme Court; the Department of Banking sought to amend the remittitur by adding to it a statement that a federal question had been raised and passed upon. The remittitur was so amended and the Department sought a writ of certiorari. This Court stated that the Department's petition was timely only if the amendment to the remittitur operated to extend the time to apply for a writ of certiorari. Because the Department's amendment "did not seek to have the Court of Appeals reconsider any question decided in the case," 317 U. S. at 266, it did not operate to extend the time to seek certiorari. Hence, because the amendment did not affect any rights already adjudicated, the subsequent proceedings did not delay the running of the ninety day period.[3]

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3 See also *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17 (1952), wherein the court of appeals first remanded a Federal Power Commission order and then modified it. An issue was raised with respect to when the period within which to apply for certiorari began (i. e., from the first court of appeals order, or from the second). This Court granted

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As these cases show, proceedings subsequent to the entry of an order will not operate to extend the time in which a petition for a writ of certiorari must be filed unless those proceedings affect the merits or the rights adjudicated in the initial order. In the present case, the court of appeals March 1, 1982 order adjudicated the question of whether EPA should pay NPRC's attorneys fees. The subsequent proceedings merely confirmed the agreement between EPA and NPRC that reasonable attorneys fees would total $15,000. Clearly, the subsequent proceedings did not in any manner affect the determination that attorneys fees would have to be paid. In fact, EPA has, since March 1982, taken the position that it would seek review only of the March 1, 1982 order (Apps. A and B). Accordingly, the petition for a writ of certiorari seeking a review of the question of whether attorneys fees should be paid by EPA had to have been filed no later than May 31, 1982. Plainly, EPA's petition was not timely filed and therefore this Court has no jurisdiction to grant review.

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CONCLUSION

The petitioner, United States Environmental Protection Agency, has failed to file its petition for a writ of certiorari within ninety days of the entry of the order awarding the Northern Plains Resource Council its attor-

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(Continued from previous page)

certiorari reasoning that since the second order actually modified the first, the time period would begin to run on the entry of the second order. 344 U. S. at 20.

neys fees. The petition is therefore untimely, and should, for that reason, be denied for lack of jurisdiction.

DATED June 9, 1983.

Respectfully submitted,

JAMES A. PATTEN
Attorney of Record

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Attorneys for the Northern Plains Resource Council

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7618

NORTHERN PLAINS RESOURCE COUNCIL, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

MONTANA POWER COMPANY, et al.,

Intervenors.

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION SPECIFYING ATTORNEYS' FEES

On March 1, 1982 the Court entered an order in the above-captioned case requiring the respondent United States Environmental Protection Agency ("EPA") to pay petitioner Northern Plains Resource Council ("NPRC") attorneys' fees. In accordance with the March 1, 1982 order[1] NPRC filed its motion specifying fees on March 15, 1982 in which it requested $40,926.75 EPA hereby responds to NPRC's motion.

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1 The March 1, 1982 order gave NPRC 14 days therefrom to file its motion and the government 14 days from the date of NPRC's filing to respond.

Counsel for respondent has conferred with counsel for NPRC regarding this matter. Said counsel have agreed that the government will pay counsel for petitioner $15,000 and that counsel for NPRC will submit an amended motion for fees to the Court. However, it is understood that although agreement has been reached as to the amount of an award to NPRC, the government does not agree that an assessment of fees against the government in these circumstances is appropriate and payment to NPRC is without prejudice to the government's right to seek further review. In fact, the government is considering seeking rehearing but has agreed that it will pay NPRC $15,000 now because we believe it would be inequitable to delay payment during any further proceedings.

Respectfully submitted,

CAROL E. DINKINS

Assistant Attorney General
Land and Natural Resources Division

By: /s/ ELIZABETH STEIN
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APPENDIX B

IN THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7618

NORTHERN PLAINS RESOURCE COUNCIL,

Petitioner,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

MONTANA POWER COMPANY, et al.,

Intervenors.

AMENDED MOTION FOR FEES

Comes now the Northern Plains Resource Council, the Petitioner herein, and hereby amends its motion specifying the attorneys' fees in the above-entitled matter. The grounds for this amended motion are as follows:

1. On March 1, 1982 this Court entered an order awarding the Petitioner Northern Plains Resource Council its reasonable attorneys' fees incurred in the above-entitled proceeding. Pursuant to that order, the Petitioners submitted a motion specifying fees in the amount of $40,926.75.

2. Counsel for Petitioners has discussed with counel for the Respondent the attorneys fees in this matter and the parties have agreed that the Respondent will pay

to the Petitioner the sum of $15,000 as reasonable attorneys fees.

3. The Respondent has reserved its right to seek further review of this Court's Order of March 1, 1982. The Petitioner similarly reserves its rights to seek an award of additional attorneys' fees if such are incurred in responding to further or additional reviews of this Court's order awarding attorneys' fees.

WHEREFORE, the foregoing reasons, the Petitioners herein respectfully request an award of $15,000 as reasonable attorneys' fees in this matter.

Respectfully submitted this 31st day of March, 1982.

PATTEN & RENZ

by: /s/ J. A. PATTEN
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No. 82-1828

FILED
JUN 13 1983
STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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NORTHERN PLAINS RESOURCE COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We briefly reply to the contention advanced by respondent Northern Plains Resource Council ("NPRC") that the government's petition for a writ of certiorari in this case was filed out of time.

1. The chronology of the proceedings in the court of appeals was as follows: On March 1, 1982, the court of appeals entered an order (Pet. App. 1a-4a) holding the Environmental Protection Agency liable for attorneys' fees under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. V) 7607(f). Plainly, this was not a final judgment because the court allowed NPRC 14 days in which to specify the size of its requested fee award and allowed EPA a like period of time in which to file an opposition (Pet. App. 4a). In April 1982, the parties agreed that $15,000 was a reasonable fee, but they further stipulated that EPA was reserving its right

to seek further review on the underlying question of NPRC's entitlement to fees. NPRC asked the court of appeals to enter an award of attorneys' fees that embodied the parties' stipulation. Thereafter, the court of appeals took no action in the matter. By letter dated July 12, 1982 (Pet. App. 6a-7a), counsel for NPRC inquired about the status of the matter, but the court did not respond. Because the case was still pending without entry of a final judgment, the government, by motion dated October 25, 1982, asked the court of appeals to stay the entry of final judgment pending this Court's decision in *Administrator* v. *Sierra Club*, No. 82-242 (argued Apr. 25, 1983). On March 3, 1983, the court of appeals denied the government's motion and ordered EPA to pay NPRC $15,000 in attorneys' fees (Pet. App. 5a). As we explain below, it was not until entry of the court's order of March 3, 1983, that there was even arguably a final judgment from which review could be sought.

2. It has long been settled that an order establishing liability is not final until the amount of damages has been determined. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744 (1976); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71-72 (1948); *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). This rule applies with equal force to judgments awarding attorneys' fees. *Crowder* v. *Telemedia, Inc.*, 659 F.2d 787, 788 (7th Cir. 1981); *Cassidy* v. *Virginia Carolina Veneer Corp.*, 652 F.2d 380, 383 (4th Cir. 1981); *Equal Employment Opportunity Commission* v. *St. Louis-San Francisco Ry.*, 651 F.2d 718, 719 (10th Cir. 1981); *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1140 (8th Cir.), cert. denied, 454 U.S. 969 (1981); *Williams* v. *Ezell*, 531 F.2d 1261, 1263 (5th Cir. 1976).[1]

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[1]The application of this rule to judgments for attorneys' fees was implicitly recognized by this Court in *Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1980). The Court indicated that judgment against Boeing was final because it held Boeing liable for a fixed amount. Pending claims

We fully accept the rule that a judgment on the merits is final and appealable even though a claim for attorneys' fees has not been decided. *Memphis Sheraton Corp.* v. *Kirkley*, 614 F.2d 131, 133 (6th Cir. 1980); *Hidell* v. *International Diversified Investments*, 520 F.2d 529, 532 n.4 (7th Cir. 1975). But, as this Court has noted, this rule simply recognizes the collateral nature of claims for attorneys' fees. *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 452 n.14 (1982). See also *Halderman* v. *Pennhurst State School & Hospital*, 673 F.2d 628, 644 (3d Cir.) cert. granted on other grounds, 457 U.S. 1131 (1982); *Goodman* v. *Heublein, Inc.*, 682 F.2d 44, 47 (2d Cir. 1982). It does not follow that where the only question contested is the collateral issue of attorneys' fees, an order establishing liability for such fees becomes final before the amount of that liability is determined.[2]

In the instant case, therefore, it is clear that the court of appeals' order of March 1, 1982, was not final; the court itself contemplated and called for further submissions from the parties on the amount of liability. The fact that the parties ultimately reached agreement on the amount of liability is of no consequence; clearly, the parties lack authority to turn an interlocutory order into a final judgment through the submission of a *proposed* judgment. Only the court of appeals itself could give the parties' stipulation the finality necessary for further review, and the court did not do so until March 3, 1983.

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for attorneys' fees did not preclude finality because they would be paid out of the damages already assessed against Boeing; Boeing's total liability would not be affected (444 U.S. at 479-480 n.5).

[2]None of the cases cited by NPRC (Br. in Opp. 4-5 & n.3) is apposite here because none involved interlocutory determinations of liability prior to the establishment of damages. As we have shown above, it is the uniform rule in the courts of appeals that attorneys' fee awards do not become final until the amount of the award is fixed.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's decision in *Administrator* v. *Sierra Club*, No. 82-242.

Respectfully submitted.

REX E. LEE
Solicitor General

JUNE 1983

DOJ-1983-06